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In the Supreme Court of the United States

OCTOBER TERM, 1976

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA, PETITIONERS

v.

PACIFIC MARITIME ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL MARITIME COMMISSION AND THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (A.P. 1a-42a)[1] is reported at 543 F. 2d 395. The opinion of the Federal Maritime Commission (A.P. 45a-79a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (A.P. 43a-44a) was entered on August 27, 1976. The Chief

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[1] "A.P." refers to the Appendix to the petition for certiorari.

Justice on November 19, 1976, extended the time within which to file a petition for a writ of certiorari to January 5, 1977. The petition was filed on that date and was granted on February 28, 1977 (App. 316). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether national labor policy requires exemption of collective bargaining agreements as a class from the filing and approval requirements of Section 15 of the Shipping Act, 1916, 46 U.S.C. 814.

2. Whether, assuming national labor policy does not require such a blanket exemption, the part of a collective bargaining agreement at issue in this case, which imposes conditions on employers who are not parties to the agreement, is nevertheless exempt from those requirements.

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Shipping Act, 1916, 39 Stat. 728, as amended, 46 U.S.C. 801 *et seq.*, are set forth in the Appendix to the petition for a writ of certiorari (A.P. 80a-86a).

STATEMENT

This case involves the jurisdiction of the Federal Maritime Commission over a collective bargaining agreement between the Pacific Maritime Association ("PMA"), a multi-employer bargaining organization

for shipping and port interests, and the International Longshoremen's and Warehousemen's Union ("ILWU"). The agreement (App. 290-293) establishes conditions under which organizations that are not members of PMA can utilize ILWU workers and can use PMA facilities such as PMA-administered fringe benefit programs and central payroll operations.

Eight municipal corporations that own and operate marine terminal facilities in the States of Oregon and Washington ("the ports") in competition with PMA members, and which are not members of the PMA, filed a complaint with the Federal Maritime Commission [2] alleging that, under Section 15 of the Shipping Act, 1916, 46 U.S.C. 814, this agreement required Commission approval prior to its implementation, that the agreement had not been filed with or approved by the Commission, and that the agree-

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[2] The ports are Anacortes, Bellingham, Everett, Grays Harbor, Olympia Port Angeles, Portland, and Tacoma (App. 9). The Port of Seattle subsequently intervened on the side of the ports.

The Council of North Atlantic Shipping Associations ("the Council"), the International Longshoremen's Association ("ILA"), and Wolfsburger-Transport Gesellschaft, m.b.H. ("Wobtrans") intervened in the proceedings before the Commission. The ILA, Wobtrans, and members of the Council were concurrently involved in other litigation before the Commission involving the scope of the labor exemption to the Shipping Act. *New York Shipping Association—NYSA-ILA Man-Hour Tonnage Method of Assessment*, 16 FMC 381, affirmed, 495 F. 2d 1215 (C.A. 2), certiorari denied, 419 U.S. 964. The Council, an East Coast employers' organization, also participated before the court of appeals in this case.

ment could not be approved under Section 15 because of its detrimental effects on competition in the shipping industry (App. 9-11).[3]

The Commission ordered an investigation (App. 9-14) to determine whether the agreement was required to be filed under Section 15; whether it violated Section 16 of the Shipping Act, 1916, 46 U.S.C. 815, by "subject[ing] any person, locality or description of traffic to undue or unreasonable prejudice or

[3] Section 15 (A.P. 80a-83a) requires "[e]very common carrier by water, or other person subject to [the Act]" to "file immediately with the Commission a true copy * * * of every agreement with another such carrier or other person subject to [the Act] * * * or modification or cancellation thereof, to which it may be a party or conform in whole or in part * * * controlling, regulating, preventing or destroying competition * * *."

The Commission is required, after notice and hearing, to disapprove, cancel or modify any agreement that it finds to be 1) unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports; 2) to operate to the detriment of the commerce of the United States; 3) to be in violation of the Act (including Section 16, 46 U.S.C. 815 (A.P. 83a-85a), which prohibits, among other practices, giving undue preference or advantage to (or subjecting to undue disadvantage) any person, locality, or description or traffic, or Section 17, 46 U.S.C. 816 (A.P. 85a-86a), which prohibits charges that are unjustly discriminatory between shippers or ports or establishing, observing or enforcing unjust or unreasonable regulations or practices relating to "the receiving, handling, storing or delivering of property"; or 4) to be contrary to the public interest.

Section 15 exempts agreements approved by the Commission from the antitrust laws. The implementation of any agreement subject to the Commission's jurisdiction that the agency has not approved or has disapproved violates the Act and subjects the offender to civil penalties of up to $1,000 per day for each day the violation continues.

disadvantage"; or whether it violated Section 17 of that Act, 46 U.S.C. 816, because it "will result in any practice which is unjust or unreasonable" (App. 12-14). PMA thereafter conditionally submitted the agreement to the Commission for approval (App. 15).

The Commission severed for expeditious determination the issue of its jurisdiction over the agreement (App. 23), and held that the agreement was subject to filing under Section 15, and not exempt, as PMA and the ILWU contended, because it involved labor-management relations (A.P. 45a-79a). PMA and the ILWU challenged this determination in the United States Court of Appeals for the District of Columbia Circuit, which reversed the Commission's ruling on jurisdiction.

A. THE LABOR-MANAGEMENT ARRANGEMENTS AND AGREEMENTS IN THE PACIFIC COAST MARITIME INDUSTRY

PMA represents some 120 steamship companies, terminal operators, stevedores, and related companies doing business on the Pacific Coast, excluding Alaska, in negotiating and implementing contracts with the ILWU (App. 9, 87). Ocean carriers have voting control of the organization, although they are not direct employers of longshoremen.[4] In 1938, the National Labor Relations Board designated "the workers who do longshore work in the Pacific Coast ports of the United States for the companies which are members

[4] App. 64-65; *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Commission*, 390 U.S. 261, 267, n. 10; *Shipowners' Association of the Pacific Coast*, 7 NLRB 1002, 1016-1017.

of [PMA's predecessor organizations]" as an appropriate bargaining unit, and certified the ILWU as bargaining representatives of those employees.[5] Then as now, however, some small employers of longshore labor were not members of PMA.[6]

Because individual longshoremen generally do not work steadily for single employers, PMA and ILWU have established institutions to provide job security and employment procedures on an industry-wide basis. Since 1935, PMA and the ILWU have jointly established and administered hiring halls where ILWU members register[7] and from which they are drawn for work assignments[8] (App. 89). PMA has

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[5] *Shipowners' Association of the Pacific Coast, supra,* 7 NLRB at 1040-1041.

[6] *Id.* at 1014-1015.

[7] For the union, the registration procedure permits a higher per capita income by limiting the size of the workforce. Larrowe, *Shape-Up and Hiring Hall,* 52 (U. Calif. Press, 1955). In conjunction with the practice of assigning jobs on a strict rotational basis within registered classes, it stabilizes and equalizes members' incomes. See *id.* at 144-148, 165-166. For employers, registration provides a relatively reliable work force (*id.* at 154-158).

[8] Hiring halls dispatch "subsidiary" registrants with limited registration and "casual" men as well as fully registered workers. (Fully registered workers have priority in assignments over "subsidiary" registrants). See *Pacific Maritime Association,* 140 NLRB 9, 11-12. Since the agreement involved in this case applies to the "jointly registered work force" (App. 290), it appears intended to restrict access to fully registered men and subsidiary registrants to the extent that they are employed through the joint PMA-ILWU hiring hall. It also controls access to non-union em-

established a central payroll and record-keeping system for these longshoremen (App. 89).

The employees also participate in various fringe benefit programs negotiated between PMA and ILWU, including a pay guarantee program, pension and welfare plans, and vacation allowances, which PMA administers (*ibid.*). PMA acts as one of the joint trustees of the fringe benefit funds to which all members of PMA contribute, so that the benefits are not affected by the withdrawal of individual employers from the industry (App. 89, 120, 207).

Prior to the agreement involved here, employers who were not members of PMA[9] could secure longshoremen from the joint work force through the ILWU-PMA hiring halls and participate in the ILWU-PMA fringe benefit plans, by negotiating separate contracts with the ILWU and supplemental participation agreements with PMA and ILWU (A.P. 3a; App. 89). The nonmembers paid specified fees to defray administrative expenses, and contributed to the fringe benefits funds in which they participated, but were not required to use all the administrative services of PMA (such as its central records and pay offices). In addition, the nonmembers could

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ployees who utilize the hiring hall as well as union employees; (use of hiring hall and registration status are independent of union membership, *In re International Longshoremen's and Warehousemen's Union, et al.* (*Waterfront Employers Ass'n*), 90 NLRB 1021, 1024-1025).

[9] Those nonmembers include not only the ports but also such longshore employers as grain elevators (App. 44) and stevedoring firms (App. 90-91).

negotiate with the ILWU the extent to which they would participate in the fringe benefit programs (App. 96, 120-121).[10] The ILWU allowed some nonmembers to retain substantially steady workforces, although it requires rotation of nearly all the men working for PMA (App. 96).

PMA told the Commission that it believed the nonmember's use of registered men gave them a competitive advantage over PMA members (App. 90). Nonmembers could use registered men but did not suffer the consequences of labor disputes between PMA and ILWU; nonmembers have taken over PMA members' work while the ILWU struck PMA (App. 90, 95-98). In addition, PMA believed that the steady work forces of some nonmembers gave them greater efficiency,[11] and a preference in allocations of longshore workers in times of labor shortage (App. 96).[12]

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[10] The ports participate in all of the PMA fringe benefit plans (under the terms of their own collective bargaining agreements) and administrative services, except for three of the smaller ports that do not use the central payroll office (App. 120-121).

[11] The union favors the rotational system because it ensures that available work is spread among the registered work force. Cf. Larrowe, *supra*, note 7, at 143. Employers believe that rotation reduces their efficiency somewhat by constantly providing different employees who must be familiarized with the employer's operations and by increasing employee travel time (*id.*, at 159-160).

[12] PMA also claims that the partial participation of nonmembers in administrative and fringe benefit programs is an administrative burden (App. 89-90).

Accordingly, the PMA Board of Directors in March 1970, resolved that nonmembers of PMA who are eligible for membership and employ workers from the same unions, "will not be allowed to share in the use of the facilities and services that PMA operates individually * * * [or] jointly with unions * * *" (App. 97-98, 104). No immediate action was taken on the resolution, however, because it would require union concurrence (App. 98).

The ILWU was aware of the resolution, and when contract negotiations started in November 1970, it included in its proposal a demand that "PMA will accept all fringe benefit contributions from any employer," including nonmembers of PMA (App. 98). In December 1970, PMA presented its counterproposal: to eliminate all nonmember participation in the hiring hall and fringe benefits under the master agreement between PMA and the ILWU. These proposals were discussed to some extent, but negotiations were at first dominated by economic issues, which resulted in a strike (App. 99). Negotiations on nonmember participation were resumed after the strike. After the exchange of several drafts (App. 100), PMA and ILWU adopted the first Nonmember Participation Agreement, identified as "No. 4, Supplemental Memorandum of Understanding," on April 25, 1972 (App. 99, 260-265 (text)).

In the interim, PMA had informed nonmembers of its initial negotiating position, and by letter and by personal visits had invited them to join the Association (App. 65, 157-158). The ports declined to do so.

After the agreement was adopted, PMA and ILWU sent a joint letter to nonmembers requesting them to sign the agreement or lose the use of the joint work force (App. 77-78). The ports, as nonmember employers, declined, and filed a complaint with the Commission.

In 1973, while this proceeding was pending before the Commission, PMA and ILWU revised parts of the Agreement. The Revised Agreement, as well as the underlying collective bargaining contract, became the subject of the Commission's decision (A.P. 48a-49a; App. 290-293 (text)).

The Revised Nonmember Participation Agreement (App. 290-293)[13] of which the ports complain establishes ten conditions for a nonmember's use of the jointly registered work force: (1) the nonmember need not become a PMA member, but must participate in the nonmember participation agreement; (2) its separate ILWU contract must conform "with the provisions [of the Revised Agreement], and the provisions of the PCLCA [Pacific Coast Longshore and Clerk's Agreement] governing the selection of men for inclusion in the joint work force"; (3) it must share in the use of the work force "upon the same

[13] The Nonmember Participation Agreement has not yet been implemented, and Commission proceedings in the case have been stayed on the motion of PMA and ILWU pending conclusion of judicial review (App. 222-223). Issues remaining before the Commission are whether the Agreement should be approved, if Section 15 covers it; whether it violates Section 16 or 17; and whether it is exempt from either Section 16 or 17 by reason of national labor policy (App. 12-13, 23, 195-196).

terms as apply to members of PMA," including obtaining men from the dispatch hall through the allocation system operated by PMA and ILWU and ceasing or limiting use of men from the dispatch hall during work stoppages by ILWU against PMA, to the extent PMA's use is limited; (4) it must pay financial obligations accrued during its use of the registered work force if its right to use is terminated; (5) it must use a steady work force "in the same way a member may do so"; (6) in order to have constructive status as a "member of PMA" for purposes of the Container Freight Station Supplement ("CFSS") (see App. 237-241), it must use the joint work force on terms no more favorable than those provided under the Pacific Coast Longshore and Clerk's Agreement, including the CFSS;[14] (7) it must participate in all of the fringe benefit plans for longshoremen, with contributions to be made "at the same rates and at the same time as members of PMA"; (8) it must use the PMA central pay system and records office, subject to the same assessments; (9) it must pay PMA an amount equal to the dues and assessments on the same basis that a PMA member would pay, and at the same time; (10) delinquency under

[14] The National Labor Relations Board has since found the CFSS to be an illegal "hot cargo clause" in violation of 29 U.S.C. 158(e). *International Longshoremen's and Warehousemen's Union (California Cartage Co.)*, 208 NLRB 994, enforced without opinion *sub nom. International Longshoremen's and Warehousemen's Association* v. *National Labor Relations Board*, 515 F. 2d 1017 (C.A.D.C.), and *Pacific Maritime Association* v. *National Labor Relations Board*, 515 F. 2d 1018 (C.A.D.C.).

items 7, 8, or 9 is ground to deny the work force to the nonmember.

The agreement contains a severability clause. It also provides that it will continue until terminated on such terms and conditions as may be "mutually agreed to" by the PMA, the ILWU and the participant.

The ports in their complaint to the Commission [15] contend that if they sign the agreement, their competitive position will be hurt because they will have to forego favorable local labor contract provisions, with resultant higher costs to port users,[16] and will re-

[15] The ports brought suit in the United States District Court for the District of Oregon alleging that the Nonmember Participation Agreement violated the antitrust laws. See App. 128-131. The Port of Longview brought a separate suit on the same theory (*ibid.*). Both cases have been stayed pending disposition of this case. The Port of Seattle also brought suit alleging, among other things, that attempts to exclude nonmembers from use of the joint work force violated the antitrust laws (see App. 163-178); the parties have dismissed this suit.

[16] For example, the Port of Anacortes may call out workers on a minimum four-hour basis to load one or two trucks; if this were eliminated as a deviant provision, the port would have additional labor costs (App. 51).

The Port of Grays Harbor has a variant contract permitting longshoremen to work in a repair shop; increasing the non-overtime day from six to eight hours; and permitting skilled workers to be shifted among several skilled jobs (App. 55).

The Ports of Olympia and Port Angeles, under the PMA-ILWU Agreement, would be required to import checkers from Seattle rather than using local ILWU employees, with attendant additional travel expense and travel pay (App. 56-57).

linquish to PMA the right to set their labor standards; and that if they do not sign the agreement, they will be prohibited from using the joint work force. They contend that, as a source for skilled workers,[17] there is no substitute for the joint work force, and that without these skilled workers the ports could not operate and would have to close.[18] Further, even with respect to less skilled dockworkers, the ports state they have relied entirely on the ILWU hiring halls and have no developed source of such workers on which they could rely (App. 220).

The ports contend that they could not obtain non-ILWU labor, since if non-ILWU longshore workers were hired, other ILWU workers at the port would refuse to work on the cargo the non-ILWU workers had handled (App. 53, 60, 220-221), thereby effectively closing the ports (*ibid.*). Picketing could also be expected adversely to affect port operations (A.P. 70a-71a). The ports argue that the union's claim that the ports are not hurt by the agreement because they have "the right to negotiate their own separate work force with other unions including the ILWU" (App. 208), is an empty one, since no such alterna-

[17] The Port of Portland lists straddle carrier drivers, lift truck drivers, Wagner log handler drivers and container, whirley and bridge crane operators as skilled longshoremen available only from the ILWU (App. 186). The ports have contributed to the training of these men (App. 187).

[18] The ports point to the multi-million dollar investments they have made in facilities and the substantial revenue losses to their communities if they closed (App. 50, 51-61).

tive work force exists, or could be used even if it did exist (App. 221).[19]

B. THE COMMISSION DECISION

After considering affidavits and memoranda submitted by the parties, the Commission held that it had jurisdiction over the Revised Agreement under Section 15 of the Shipping Act, 1916.[20] It determined that since ocean common carriers and terminal operators, as members of PMA, were parties to the agreement, it constituted an agreement among "person[s] subject to the Shipping Act," despite the participation of persons not subject to the Act such as the ILWU (A.P. 52a-54a). Further, since the admitted purpose

[19] The ports also considered unacceptable the possibility of not signing the agreement and contracting with PMA stevedoring companies. The ports then could no longer inform the stevedores that the port is considering the option of doing the work itself; the expected result would be higher prices and reduced services (App. 59). The ports were also concerned that the stevedoring companies would attempt to divert cargo to other ports where the companies could operate more conveniently and economically (App. 52).

[20] The Commission rejected a suggestion by its Hearing Counsel that, even if it had jurisdiction, it should defer to the the National Labor Relations Board or the courts as bodies with greater expertise in labor and antitrust matters. It considered deferral to the Board inappropriate because the case concerned an allegedly anticompetitive agreement between union and employer, not a failure of the collective bargaining process (A.P. 49a-51a). It found the agreement "so intricately involved with its responsibilities under the shipping statutes" that deferral to the court in the pending antitrust cases would be inappropriate (A.P. 51a-52a).

of the agreement was to place PMA members and nonmembers on an equal competitive basis, it was an "agreement • • • controlling [or] regulating • • • competition." Thus, the Commission concluded that the agreement came within the filing and approval requirements of Section 15 unless it was entitled to a labor exemption analogous to that recognized under the antitrust laws (A.P. 55a-56a).

In determining whether the agreement was subject to a labor exemption, the Commission applied the guidelines it had developed in *United Stevedoring Corp.* v. *Boston Shipping Association*, 16 FMC 7, for accommodating Shipping Act policies with labor policy where collective bargaining agreements are at issue.[21] The Commission had derived these criteria from the case law defining the exemption from the antitrust laws for collective bargaining agreements, where the agreement has anticompetitive effects and the legitimate labor interest is weak or nonexistent. See *e.g.*, *United Mine Workers* v. *Pennington*, 381 U.S. 657; *Meat Cutters* v. *Jewel Tea*, 381 U.S. 676; *Allen Bradley Co.* v. *Local No. 3*, 325 U.S. 797.

The Commission found that the PMA-ILWU agreement failed to meet the *Boston Shipping* guidelines for exemption from the Shipping Act, 1916, in two

[21] In *Boston Shipping, supra*, the Commission stated generally that the extent of the possible effect of an agreement on competition would have to be weighed against the effect of Commission sanctions on the collective bargaining process, and it announced guidelines for making that determination. See pp. 37-38, *infra*.

respects. First, the agreement did not relate to a mandatory bargaining subject, since it was not directed at the hours and working conditions of PMA employees as such, but rather at the labor policies of nonmembers (A.P. 61a-62a). Second, since the agreement was specifically designed to compel nonmember entities to observe PMA labor policies under threat of exclusion from the ILWU work force, it imposed terms on persons outside the bargaining unit (A.P. 62a-63a). The Commission stated that the agreement, by regulating the conduct of third parties, bore a "striking resemblance" to the agreement held not exempt from the antitrust laws in *United Mine Workers* v. *Pennington*, *supra* (A.P. 66a).

The Commission concluded (A.P. 72a):

> weighing the various Shipping Act and labor interests raised by the Revised Agreement, we conclude * * * that the many and potentially severe shipping problems raised by the Revised Agreement balanced against the minimal impact our regulation thereof would have on the collective bargaining process [22] fully warrants our denial of a "labor exemption" in this proceeding.[23]

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[22] The Commission stated (A.P. 71a):

> [W]e find that the Revised Agreement has little if any effect on the collective bargaining process. With or without the Revised Agreement, the provisions for fringe benefits, which are the main concern of the ILWU, remain unchanged.

[23] Commissioner Morse dissented, arguing that, in light of the labor policies involved, the Commission in its discretion should defer to the National Labor Relations Board and the courts. If the courts upheld the agreement, he would then have exercised Commission jurisdiction to determine whether any practices under it violated Section 16 or 17 of the Shipping Act (A.P. 73a-75a).

The Commission ordered the case set for hearing on the merits (A.P. 76a-77a).

C. THE COURT OF APPEALS DECISION

On appeal by PMA and the ILWU, the Court of Appeals for the District of Columbia Circuit held that the Commission has no Section 15 jurisdiction over the Revised Agreement. It concluded that the statutory requirement for prior Commission approval of agreements would pose an intolerable barrier to prompt implementation of collective bargaining agreements and maintenance of industrial peace in the shipping industry, and that Section 15 therefore is inapplicable to all collective bargaining agreements (A.P. 28a-29a). The court rejected temporary Commission approval of agreements as a solution, since this did not remove the "resultant specter of a final agreement * * * [being] upset by [later] partial invalidation * * *" (A.P. 30a).

The court concluded that exempting collective bargaining agreements "as a class" from Section 15 is the best method to reconcile labor and shipping objectives (A.P. 35a). It recognized that its holding precluded for collective bargaining agreements the antitrust immunity that Section 15 approval provides, even in cases in which shipping considerations would support an exemption (A.P. 41a). The court stated

that Sections 16 and 17 of the Act[24] and the antitrust laws provide adequate remedies for dealing with the anti-competitive consequences of collective bargaining agreements in the shipping industry, while avoiding the delay in establishing industrial peace that requiring prior Commission approval of such agreements would cause. (A.P. 38a-40a).

As an alternative ground of decision, the court stated that, even under a balancing test weighing Shipping Act and labor relations considerations, the agreement would be exempt from filing (A.P. 35a). It concluded that the ports' argument "boils down to an accusation that they are being forced against their wills into a multi-employer unit" and that Section 15 "was [not] intended to cover problems so clearly within the realm of National Labor Relations Board expertise" (A.P. 37a).

SUMMARY OF ARGUMENT

I

A. 1. Section 15 of the Shipping Act, 1916, requires persons covered by the Act to file with the Federal Maritime Commission "every agreement * * * controlling, regulating, preventing, or destroying competition." The Commission must disapprove agreements that violate the standards provided in Section 15. It is illegal to carry out an agreement that the

[24] The court stated that a labor exemption analogous to the labor exemption from the antitrust laws could properly be applied under Sections 16 and 17 (A.P. 40a). That question is pending before the Commission (A.P. 72a).

Commission has not approved or has disapproved. Agreements the Commission has approved are exempt from the antitrust laws.

Nothing in the broad language of Section 15 or its legislative history suggests that collective bargaining agreements as a class are exempt from its requirements. To the contrary, this Court's ruling in *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Commission*, 390 U.S. 261, 277, that the Commission improperly had exempted from the Act a category of agreements that was neither "*de minimis* nor routine," indicates that collective bargaining agreements likewise are not exempt as a class. Although the Act authorizes the Commission to exempt from its requirements "any class of agreements" (Section 35, 46 U.S.C. 833a), the agency has not exempted collective bargaining agreements.

2. In administering the Shipping Act, the Commission is required to consider antitrust policies. One aspect of those policies is the recognition that certain aspects of collective bargaining agreements are exempt from the antitrust laws. The Commission properly has concluded that there is a labor exemption under Section 15 comparable to that under the antitrust laws. The exemption is not a blanket one, however, but, like the antitrust exemption, involves a balancing of interests: here, labor and Shipping Act interests.

It is through this labor exemption to the Shipping Act that national labor policy is recognized in the administration of that Act. That policy does not

require a blanket exemption of all collective bargaining agreements from the scrutiny of the Commission, regardless of how seriously adverse their effects upon competition may be.

B. The court of appeals seriously exaggerated the effect that the requirement in Section 15 of prior filing with and approval by the Commission of collective bargaining agreements would have upon collective bargaining. There are no empirical data supporting the court's conclusion that obtaining advance Commission approval of anticompetitive provisions of those agreements would interfere with the bargaining process. To the contrary, by removing the uncertainty about the legality of some provisions, Commission approval would appear likely to aid rather than handicap the reaching of agreement and the maintenance of industrial peace.

Under the Commission's guidelines, most routine collective bargaining provisions would not require filing with the Commission. Moreover, if there is serious question concerning the applicability of Section 15 to particular provisions, the Commission normally will give interim conditional approval, and may issue a declaratory order.

II

A. In holding that the Revised Agreement does not have a labor exemption under Section 15, the Commission properly applied its balancing test. It found, and the record supports the findings, that the Revised Agreement failed to meet two of the guidelines the Commission uses in applying the balancing test:

(1) Since the primary purpose of the agreement was to place pressure on nonmembers of PMA to join that organization, the agreement did not involve a mandatory subject of bargaining because any effect it had on labor relations between the union and PMA members was minimal. (2) The agreement endeavored to impose terms and conditions on persons outside the bargaining unit, namely, upon nonmembers of PMA. In this respect, the agreement closely resembles the agreement held not to be exempt from the antitrust laws in *United Mine Workers* v. *Pennington*, 381 U.S. 657.

The Commission correctly concluded that the agreement does not merit a labor exemption. It ruled that although the agreement would have little effect upon labor relations—the agreement would not affect fringe benefits, which are the union's main concern—it would have potentially seriously adverse effects upon Shipping Act interests, since it could result in shutting down the ports that are not members of PMA.

B. As an alternative ground for decision, the court of appeals stated that even under a balancing test, the agreement is entitled to a labor exemption. The court exceeded the proper scope of judicial review by itself undertaking the weighing of the competing Shipping Act and labor interests, a task that is primarily for the Commission to perform. The Commission's balancing of the competing interests reflects its knowledge of the shipping industry, and the court of appeals should have given greater deference to the agency's expert judgment.

The fact that some provisions of the Revised Agreement may raise questions under the National Labor Relations Act does not vitiate the Commission's conclusion that the agreement is not entitled to a labor exemption. As this Court has recognized, collective bargaining agreements may raise problems under both the Labor Act and other regulatory statutes; the National Labor Relations Board and the other regulatory agency each may consider the issues within its own jurisdiction. Similarly, the Commission was not required to stay its hand because the issues before it under the Shipping Act were also the subject of pending antitrust suits. Normally, the court defers to the agency, not the agency to the court. Here the case for the Commission acting first is particularly compelling, since if it approves the agreement under Section 15, the agreement will obtain antitrust immunity, and the antitrust suits will terminate.

ARGUMENT

I.

COLLECTIVE BARGAINING AGREEMENTS AS A CLASS ARE NOT EXEMPT FROM SECTION 15 OF THE SHIPPING ACT, 1916

A. Section 15 covers collective bargaining agreements.

Section 15 of the Shipping Act, 1916, requires persons covered by that Act to file with the Federal Maritime Commission "every agreement * * * controlling, regulating, preventing or destroying competition" (A.P. 80a). The Commission is required to disapprove any agreement that it "finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, * * * or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations" (*id.* at 81a). It is illegal to carry out any agreement subject to Section 15 unless the Commission has approved it or if the Commission has disapproved it (*id.* at 82a). Agreements the Commission has approved are exempt from the antitrust laws (*id.* at 82a).

Nothing in this broad language even suggests that because an agreement "controlling, regulating, presenting or destroying competition" is a product of collective bargaining, it is exempt from the requirements of Section 15.

Although Section 15 covers "every" agreement, the Commission may "determine, after appropriate administrative proceedings, that some types or classes of agreements coming within the literal provisions of § 15 are of such a *de minimis* or routine character as not to require formal filing" (*Volkswagenwerk*, *supra*, 390 U.S. at 276). Indeed, Congress has expressly authorized the Commission to except from the Act "any class of agreements * * * where it finds that such exemption will not substantially impair effective regulation by the Federal Maritime Commission, be unjustly discriminatory, or be detrimental to commerce" (Section 35, 46 U.S.C. 833a).

Nothing in Section 15 or its legislative history, however, indicates that Congress intended to exempt from Commission scrutiny all collective bargaining agreements that control, regulate, prevent or destroy competition.[25] The existence of that specific exemptive authority strongly suggests that Congress intended to leave it to the discretion of the agency to determine what categories of anti-competitive agreements should be excepted from Section 15. The Commission has not exempted this class of agreements from Section 15.

In *Volkswagenwerk, supra*, this Court rejected an attempt by the Commission itself to exempt a significant type of agreement from Section 15. There the Commission had held that that section did not cover an agreement among PMA members establishing the formula by which the costs of a fund to mitigate the impact of technological unemployment upon maritime

[25] The legislative history of the Shipping Act is unilluminating concerning Congress' specific intent where a labor union is a signatory to an agreement otherwise subject to the Act (see A.P. 34a). Since port-wide labor organizations had been formed in Seattle and New York only in 1915 and 1916, respectively (see A.P. 34a, n. 32), the problem of the effect of anti-competitive provisions of collective bargaining agreements in the shipping industry was not then serious and Congress understandably did not consider it. The Act was broadly designed, however, to provide for the "regulation of * * * such * * * conditions of water transportation as affect the interests of shippers" (H.R. Doc. No. 805, 63d Cong., 2d Sess. 419 (1914)). Nothing in the legislative history indicates that Congress intended to exclude from the requirement in Section 15 of Commission scrutiny of anti-competitive agreements, those agreements that were reached through collective bargaining.

employees, established by a collective bargaining agreement between PMA and ILWU, were to be allocated among some of those members. The Commission's theory was that although the assessment formula for the fund "was a 'cooperative working agreement' clearly within the plain language of § 15," the statute governs only agreements that "affect * * * competition" in the sense that "there was an additional agreement by the [Association] membership to pass on all or a portion of its assessments to the carriers and shippers served by the terminal operators" (390 U.S. at 271-272).

This Court held that since the agreement "was neither *de minimis* nor routine * * * [it] was required to be filed under § 15 of the Act" (*id.* at 277). It pointed out that the "statute * * * uses expansive language" (*id.* at 273) and that "[t]o limit § 15 to agreements that 'affect competition,' as the Commission used that phrase in the present case, simply does not square with the structure of the statute" (*id.* at 275, footnote omitted). The Court stated that "[n]othing in the legislative history suggests that Congress, in enacting § 15 of the Act, meant to do less than * * * subject to the scrutiny of a specialized government agency the myriad of restrictive agreements in the maritime industry" (*id.* at 276, footnote omitted).

The Court in *Volkswagenwerk* rejected the Commission's attempt itself to exempt from Section 15 a significant category of agreements. Here the Commission refused to create an exemption for a similarly broad group of agreements, but the court of

appeals provided such an exemption. In so doing, the Court impermissibly trenched upon an area Congress assigned primarily to the Commission.

Volkswagenwerk did not directly involve the basic collective bargaining agreement between PMA and ILWU, but only the subsequent agreement, which the collective bargaining agreement contemplated, by which the employers specified the procedure for raising the fund that the collective bargaining agreement created. Indeed, the Court stressed (390 U.S. at 278) that the "only agreement involved in this case is the one among members of the Association"; that "[n]o claim has been made in this case" that "the collective bargaining agreement between the Association and the ILWU * * * was subject to the filing requirements of § 15"; and that nothing in its opinion "is to be understood as questioning * * * [the] continuing validity [of that agreement]."

But the basic rationale of *Volkswagenwerk*—that there is no basis in the statute for reading into Section 15 an exemption for anti-competitive agreements that are "neither *de minimis* nor routine" (390 U.S. at 277)—is inconsistent with the view that all collective bargaining agreements are exempt from Section 15, or that an anti-competitive provision is exempt because it appears in such an agreement. Cf. *New York Shipping Association, Inc.* v. *Federal Maritime Commission*, 495 F.2d 1215, 1220-1221 (C.A. 2), certiorari denied, 419 U.S. 964. The question whether that section applies depends not upon the subject matter of, or the participation of third parties, such as

unions, in the agreement, but upon the agreement's purpose and effect: whether it is an agreement "controlling, regulating, preventing, or destroying competition."

B. National labor policy does not require or justify a blanket exemption from Section 15 for collective bargaining agreements.

1. The court of appeals concluded, however, that "agreements between labor and management, while subject to antitrust and shipping legislation, cannot be fitted into the pre-implementation approval procedures of Section 15 without ignoring the national policy fostering industrial peace through collective bargaining" (A.P. 42a). It stated that "the prior-restraint procedures of section 15 impose such an extraordinary burden on collective bargaining that the dividing line must be drawn between labor-related agreements among employers, which are subject to section 15, and direct agreements negotiated between union and management, which we hold to be outside the scope of that section" (*id.* at 2a). In its view "[t]he nature of collective bargaining as it exists in this country today requires the ability of both sides to implement promptly the compromise agreements worked out in eleventh-hour bargaining sessions or, as in this case, in hard-fought negotiations following a strike and mediation" (*id.* at 28a-29a). "Subjecting negotiated labor agreements to filing and approval (or disapproval or modification) * * * would make nearly impossible the maintenance or prompt restoration of industrial peace * * *" (*id.* at 28a).

As explained in Point II A, pp. 32-37, *infra*, in administering the Shipping Act the Commission is required to take account of the policies of the antitrust laws. As part of that process, the agency properly recognizes a labor exemption from the Shipping Act comparable to the labor exemption from the antitrust laws. It is through the recognition of that exemption, however, that national labor policy is reflected in the administration of the Shipping Act. National labor policy does not call for a blanket exemption of all collective bargaining agreements from Section 15, without regard to the impact of the restraints in a particular agreement upon competition and the comparative significance of those restraints for valid Shipping Act and labor interests.

2. The court of appeals exaggerated the impact that prior Commission approval of collective bargaining agreements would have upon the collective bargaining process and the maintenance and restoration of industrial peace.

Under the Commission's standards for determining whether a particular collective bargaining agreement has a labor exemption, most routine agreements covering wages, prices and working conditions would not be subject to the filing requirement of Section 15 (see Point II B, *infra*). Providing an exemption for all collective bargaining agreements, however, would preclude the Commission from applying the standards of Section 15 to major agreements whose impact goes far beyond traditional labor relations matters and which implicate important Shipping Act and anti-

trust issues. For example, such an exemption would insulate from Commission scrutiny agreements covering restrictive practices in a major port, as in the *New York Shipping Association* case, *supra*, or on the entire West Coast, as in the present case.

The court of appeals' conclusion that the delay in implementing a collective bargaining agreement while Commission approval is obtained would be harmful to the collective bargaining process, does not rest upon empirical data, but is largely conjecture. It does not provide an adequate basis for creating a broad exemption from Section 15 for all collective bargaining agreements.

Moreover, it is far from clear that the delay in implementing such agreements would impede collective bargaining, in circumstances where the effect of such advance approval is to protect against invalidation of the agreement under the Shipping Act or the antitrust laws. In many situations the parties to collective bargaining agreements—particularly where the legality of some provisions may be open to question under those laws—may be better off if such legality is determined before the agreement is implemented. Such approval would avoid the inevitably disruptive effect when an operative collective bargaining agreement is invalidated. As Mr. Justice Harlan stated in his concurring opinion in *Volkswagenwerk* (390 U.S. at 285-286):

> • • • I would find it very difficult to see why provision for advance approval and [antitrust] exemption of labor-related agreements would not

be preferable, from the standpoint of facilitating collective bargaining, to the "wait and see" approach.[26]

Finally, the parties to collective bargaining may seek from the Commission temporary, *i.e.*, conditional, approval of an agreement before it is implemented or finally approved. For example, in 1970 the Commission gave conditional approval to an agreement involving labor arrangements between a shipping association and a union in the Port of New York (*Agreement Relative to the New York Shipping Association Cooperative Working Arrangement*, FMC Docket No. 69-57, March 11, 1970). It stated:

> Our past experience leads us to the view that should the [New York Shipping] Association default in its payment to the ILA [International Longshoremen's Association], a labor crisis would result at the Port of New York. That such a crisis would be adverse to the public interest and work to the detriment of our foreign commerce is, we think, beyond dispute. * * * We firmly believe that considerations of public interest require that we conditionally approve Agreement T-2390 now.

[26] The court of appeals stated (A.P. 31a-32a) that because (1) there are substantial penalties for violation of the Shipping Act and (2) the Commission applies "rule-of-thumb" guidelines in determining on a case-by-case basis whether particular collective bargaining agreements have a labor exemption, employers would be likely to file "all agreements with potential anticompetitive results, thus further disrupting the course of negotiations." As previously indicated, however, the labor exemption covers the bulk of routine collective bargaining provisions. Moreover, an employer's possible difficulty in determining whether a particular collective bargaining agreement must be filed under Section 15 is unlikely to be any greater than that involved in many of the other determinations it must make in deciding whether to file other agreements, such as those conferring "special advantages" or "in any manner" providing for "exclusive, preferential or cooperative working arrangement" (A.P. 80a).

Moreover, the Commission will issue a declaratory order about the validity of or need to file a particular agreement if necessary to "remove uncertainty" or "terminate a controversy." See 46 C.F.R. 502.68. That was the procedure the parties to the agreement selected in the *New York Shipping Association* case, *supra*, where they sought from the Commission "an order declaring that the assessment agreement was not subject to the filing or approval requirements of § 15 of the Shipping Act" (495 F.2d at 1218).

The blanket immunity from Section 15 that the court of appeals has created for collective bargaining agreements would produce undesirable and anomalous results. For example, agreements that might otherwise violate the antitrust laws but that the Commission would approve under Section 15 because they would further the policy of the Shipping Act or provide important public benefits, would be denied the antitrust immunity that Commission approval confers. Conversely, agreements that would violate Section 15 if a union were not a party, but not violate

Section 16 or 17[27] or the antitrust laws, would be permitted to become effective."[28]

II.

THE FEDERAL MARITIME COMMISSION PROPERLY CONCLUDED THAT THE REVISED NON-MEMBER PARTICIPATION AGREEMENT DOES NOT MERIT A LABOR EXEMPTION

A. Collective bargaining agreements have an implied exemption from Section 15 similar to the labor exemption from the antitrust laws.

In the Shipping Act, 1916, Congress placed under government supervision the conference system by

[27] Section 16 prohibits the giving of an "undue or unreasonable preference or advantage." Section 17 makes unlawful rates, fares, or charges that are "unjustly discriminatory between shippers or ports or unjustly prejudicial to exporters of the United States as compared with their foreign competitors"; and requires persons subject to the Act to observe just and reasonable regulations and practices relating to the receiving, handling, storing or delivering of property. Agreements that do not violate these specific prohibitions nevertheless may violate the broader provisions in Section 15 against agreements that "operate to the detriment of the commerce of the United States" or are "contrary to the public interest."

[28] The court of appeals also stated (A.P. 28a) that by "plac[ing] collective bargaining units in the shipping industry under more stringent federal regulation than other transportation industries," the former would be "at a competitive disadvantage." That conclusion rests on the same premise as the court's theory that requiring advance approval will impede collective bargaining, and it is subject to the same flaws. Moreover, since the shipping industry already is required to obtain advance Commission approval of a large number of agreements, it is difficult to see why also requiring such approval of a relatively small number of additional agreements resulting from collective bargaining would adversely effect its competitive position against other transportation industries.

which steamship lines fixed prices and otherwise suppressed competition, and gave an administrative agency the authority to approve or disapprove anti-competitive agreements in the shipping industry. See *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 736-738. Congress established standards governing approval or disapproval, and exempted from the antitrust laws agreements the agency approved. In 1961 these standards were revised to provide for Commission disapproval of agreements that are " 'contrary to the public interest' " (see *Federal Maritime Commission* v. *Svenska Amerika Linien*, 390 U.S. 238, 243).

The public interest standard in Section 15 "requir[es] the Commission to consider the antitrust implications of an agreement before approving it" (*Federal Maritime Commission* v. *Seatrain Lines, Inc.*, *supra*, 411 U.S. at 739). Although the Commission may approve agreements "even though they are violative of the antitrust laws * * * [it] must take antitrust principles into account in reaching its decision" (*id.* at 728). The Commission may disapprove an agreement because of its inconsistency "[with] antitrust policy" (*Federal Maritime Commission* v. *Svenska Amerika Linien*, *supra*, 390 U.S. at 243). The Commission follows the principle that "conference restraints which interfere with the policies of antitrust laws will be approved only if the conferences can 'bring forth such facts as would demonstrate that the * * * rule was required by a serious transportation need, necessary to secure important public bene-

fits or in furtherance of a valid regulatory purpose of the Shipping Act, *See* [10] F.M.C., at [27, 45]." (*Federal Maritime Commission* v. *Svenska Amerika Linien*, 390 U.S. 238, 243). This Court has "construe[d] the Shipping Act as conferring only a 'limited 'antitrust exception' in light of the fact that 'antitrust laws represent a fundamental national economic policy.'" (*Federal Maritime Commission* v. *Seatrain Lines, Inc.*, *supra*, 411 U.S. at 733).

One aspect of the "fundamental national economic policy" that the antitrust laws represent is that certain aspects of collective bargaining agreements are exempt from the application of the antitrust laws. This principle had its origin in Sections 6 and 20 of the Clayton Act, 38 Stat. 731, 738, 15 U.S.C. 17, 29 U.S.C. 52, as supplemented by Sections 4, 5, and 13 of the Norris-LaGuardia Act, 47 Stat. 71, 73, 29 U.S.C. 104, 105 and 113. See *Connell Construction Co., Inc.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 621. "The Court has recognized, however, that a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions" (*id.* at 622).

The Court explained the rationale of this nonstatutory exemption as follows (*id.* at 622-623):

> The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws. The Court therefore has acknowledged that labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions. See *Mine Workers* v. *Pennington*, *supra*, at 666; *Jewel Tea*, *supra*, at 692-693 (opinion of White, J.). Labor policy clearly does not require, however, that a union have freedom to impose direct restraints on competition among those who employ its members. Thus, while the statutory exemption allows unions to accomplish some restraints by acting unilaterally, *e.g.*, *Federation of Musicians* v. *Carroll*, 391 U.S. 99 (1968), the nonstatutory exemption offers no similar protection when a union and a nonlabor party agree to restrain competition in a business market.

In considering the policies reflected in the antitrust laws in applying Section 15, the Commission properly concluded that it should recognize a labor exemption comparable to that long recognized under the antitrust laws themselves. As the Commission stated in its decision recognizing that exemption (*United Stevedoring Corp.* v. *Boston Shipping Association*, 16 FMC 7, 11):

> The "labor exemption" originated in the area of accommodation of the labor laws and the antitrust laws. To preclude the application of the antitrust laws to various collective bargaining agreements entered into between labor and man-

agement, the courts carved out of the antitrust laws a "labor exemption", by means of which such agreements were held to be immune from attack under antitrust laws. Thus, the analogy to a "labor exemption" from the shipping laws is obvious.

The Commission pointed out (*id.* at 13):

> Since maritime employers are permitted to bargain as a group, and since they are required to bargain about certain subjects (the mandatory subjects of collective bargaining), the resulting agreements must have some exemption from the requirements of section 15.

It would be anomalous if the Commission, although required to consider the antitrust laws and policies in applying Section 15, could not also take account of the exemption from those standards that exist for certain restrictive provisions in collective bargaining agreements. This is particularly so because in the Shipping Act Congress, to a considerable degree (cf. *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, *supra*), has substituted the standards and procedures of that Act for the antitrust laws as the method of regulating competition in the shipping industry. The reasons that require an accommodation of shipping and antitrust interests also require recognition of the fundamental national policy that certain aspects of labor-management relations are not subject to the antitrust laws. As Mr. Justice Harlan stated in his concurring opinion in *Volkswagenwerk* (390 U.S. at 287):

> Since maritime employers are permitted to bargain as a group, and since they are required to bargain about certain subjects, the resulting agreements must have some exemption from the filing requirements of § 15 and from successful challenge under the antitrust laws or under the substantive principles in §§ 16 and 17 of the Shipping Act.

B. In determining whether a particular collective bargaining agreement has a labor exemption, the Commission properly reconciles Shipping Act and labor interests by weighing and balancing the comparative impacts upon those interests of applying Section 15 to the agreement.

In *Boston Shipping Association*, *supra*, the Commission properly "adopt[ed] for purposes of assisting us in determining the labor exemption from the shipping laws" the criteria this Court has developed "for determining the labor exemption from the antitrust laws" (16 FMC at 12). The Commission stated that although it would resolve "each case on an ad hoc basis," the following criteria, none of which was itself "controlling," would provide "[objective] guidelines or 'rules of thumb' for each factual situation" (*id.* at 12-13):

> 1. The collective bargaining which gives rise to the activity in question must be in good faith. Other expressions used to characterize this element are "arms-length" or "eyeball to eyeball".
>
> 2. The matter is a mandatory subject of bargaining, *e.g.* wages, hours or working conditions. The matter must be a proper subject of union

concern, *i.e.*, it is intimately related or primarily and commonly associated with a bona fide labor purpose.

3. The result of the collective bargaining does not impose terms on entities outside of the collective bargaining group.

4. The union is not acting at the behest of or in combination with nonlabor groups, *i.e.*, there is no conspiracy with management.

The Commission further stated (*id.* at 13):

> In the final analysis, the nature of the activity must be scrutinized to determine whether it is the type of activity which attempts to affect competition under the antitrust laws or the Shipping Act. The impact upon business which this activity has must then be examined to determine the extent of its possible effect upon competition, and whether any such effect is a direct and probable result of the activity or only remote. Ultimately, the relief requested or the sanction imposed by law must then be weighed against its effect upon the collective bargaining agreement. In balancing the equities, the above criteria will no doubt be of value.

The Commission's guidelines for determining the labor exemption under the Shipping Act fairly reflect the standards this Court has developed for the labor exemption under the antitrust laws. Cf. *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469; *United States* v. *Hutcheson*, 312 U.S. 219; *Allen Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797; *United Mine Workers* v. *Pennington*, 381 U.S. 657; *Connell Construction Co., Inc.* v. *Plumbers & Steamfitters Local Union No. 100*, *supra*. As the Court explained in *Pennington* (381 U.S. at 664-665, 666, 668):

> * * * [A] union may conclude a wage agreement [for] the multi-employer bargaining unit without violating the antitrust laws * * *.
>
> This is not to say that an agreement resulting from union-employer negotiations is automatically exempt from Sherman Act scrutiny simply because the negotiations involve a compulsory subject of bargaining, regardless of the subject or the form or content of the agreement. * * *
>
> * * * [A] union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. * * *
>
> * * * [T]here is nothing in the labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions in other bargaining units or to attempt to settle these matters for the entire industry. * * *
>
> * * * * *
>
> On the other hand, the policy of the antitrust laws is clearly set against employer-union agreements seeking to prescribe labor standards outside the bargaining unit.

Cf. *Meat Cutters* v. *Jewel Tea*, 381 U.S. 676, 689-690 (opinion of Mr. Justice White).

As the foregoing decisions of this Court show, the determination whether particular restraints in a col-

lective bargaining agreement are covered by the labor exemption from antitrust laws requires a balancing of the effect of those restraints upon labor interests on the one hand and competition on the other hand. The Commission acted within its authority in adopting a similar method for determining the scope of the labor exemption to the Shipping Act.

Under both statutes there is a preliminary determination whether the challenged agreement or conduct qualifies for the labor exemption. If it does, that is the end of the inquiry, and the case is over. If it does not qualify, there is the further determination of violation. Under the Shipping Act, that determination also involves a balancing process: the anti-competitive effects of the restraints must be weighed against the Shipping Act interests that the restraints serve. In making the preliminary determination whether the labor exemption covers particular restraints, the Commission properly weighs the comparative impact upon Shipping Act and labor interests of subjecting the agreement to Section 15.

C. The Commission correctly concluded that under the balancing test the Revised Nonmember Participation Agreement does not have a labor exemption.

The court of appeals ruled (A.P. 35a) that "[e]ven if we were to adopt the balancing test suggested by Justice Harlan [in *Volkswagenwerk*], the agreement at issue would be exempt from filing." The court viewed the issue in the case under a balancing test as whether nonmembers of PMA "are being forced against their will into a multi-employer unit [PMA]," and concluded that "the Shipping Act pre-implementation approval provision was [not] intended to cover problems so clearly within the realm of National Labor Relations Board expertise" (A.P. 37a).

In thus itself undertaking to balance the competing interests, the court exceeded the proper scope of judicial review. If, as we believe, the Commission may use the balancing test for determining whether a particular agreement has a labor exemption, the role of the reviewing court necessarily is limited. Its function is to determine whether, in striking the balance as it did in this case against a labor exemption, the Commission abused its discretion. As we now show, the Commission's decision in this case, reflecting as it did "the Commission's special familiarity with the shipping industry, is fully within the competence of this administrative agency and should be respected by the reviewing courts." (*Federal Maritime Commission* v. *Svenska Amerika Linien*, *supra*, 390 U.S. at 249; cf. *New York Shipping Association, Inc.*, *supra*, 495 F.2d at 1221-1222.)

1. The Commission properly concluded (A.P. 55a-56a) that the Revised Agreement was one "controlling, regulating, preventing, or destroying competition," which under Section 15 must be filed for agency approval unless it has a labor exemption.[29] As the

[29] PMA, ILWU and the Council of North Atlantic Shipping Associations argued before the Commission that the agency had no jurisdiction over the agreement because some members of PMA are not subject to Commission jurisdiction. The Commission properly rejected this contention.

Section 15 gives the Commission jurisdiction over agreements among "common carrier[s] by water" and "other

Commission pointed out (A.P. 55a-56a, footnote omitted), "PMA itself readily admits that the purpose of the supplemental agreement is to * * * place nonmembers on the same 'competitive' basis as members of the PMA.[30] In short, the effect of the Revised Agreement

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person[s] subject to the Act" (A.P. 80a). "Other person[s] subject to the Act" is defined to mean any person, not a common carrier by water, in "the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water" (Section 1, 46 U.S.C. 801). Some of the members of PMA, such as the stevedoring companies, as well as the ILWU, are not "other person[s]" under this definition.

The Commission consistently has held that it has jurisdiction over an association which includes members who are common carriers by water or "other persons," even though other members are not in that category. See *Boston Shipping Association, supra*, 16 FMC at 9-10; *New York Shipping Association*, 16 FMC 381. In upholding the Commission's jurisdiction in the latter case, the court of appeals for the Second Circuit stated (*New York Shipping Association, supra*, 495 F. 2d at 1220):

> The assessment agreement fits the definition of § 15 since it imposes obligations on common carriers by water and other persons subject to the Shipping Act, to wit, terminal operators, see 46 U.S.C. § 801. An agreement to which such persons are parties is not taken out of § 15 by the fact that persons not fitting that definition, to wit, stevedoring contractors who are not terminal operators, are also bound. *Volkswagenwerk* established that an agreement among water carriers, stevedoring contractors and terminal operators allocating assessments for benefits negotiated with a longshoremen's union requires approval under § 15.

[30] See also the statements by PMA officials at App. 89-90, 95-98, 102.

is to control or affect competition between members and nonmembers." [31]

2. In denying a labor exemption, the Commission stated (A.P. 69a-70a, footnote omitted):

> In the "final analysis", our assertion of jurisdiction over a labor-related agreement requires, as we noted in *Boston Shipping*, a consideration of the impact of such agreement on the competitive conditions in the industry, vis-a-vis its impact on the collective bargaining process. On this basis, and taking into consideration several past court decisions involving labor-related agreements, we find that while the Revised Agreement has a minimal effect on the collective bargaining process, it has such a potentially severe and adverse effect upon competition under the Shipping Act as would justify our consideration of its approvability under the standards thereof.

It noted that the ports' "failure to sign the Revised Agreement" could have a seriously adverse impact

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[31] The Commission noted, as an example of the effects of the agreement on competition, its provision requiring nonmembers to honor PMA lockouts, thus preventing nonmembers from continuing operations while members' facilities are shut down (A.P. 56a, n. 8).

The Commission's conclusion that the agreement controls competition is in accord with decisions condemning, as violations of the Sherman Act, concerted action that places onerous conditions on the use of a unique resource necessary to do business. See *Associated Press* v. *United States*, 326 U.S. 1; *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 347-349; *United States* v. *Terminal Railroad Association of St. Louis*, 224 U.S. 383, 409-411.

The Court has previously approved the application of Sherman Act principles to invalidate a similar agreement under the

upon "their ability to compete with PMA members," because it "could well result in the closing of their facilities and the cessation of [their] operations" (A.P. 70a). "On the other hand, we find that the Revised Agreement has little if any effect on the collective bargaining process. With or without the Revised Agreement, the provisions for fringe benefits, which are the main concern of the ILWU, remain unchanged" (A.P. 71a).[32]

In thus weighing and balancing the competing interests, the Commission utilized the guidelines it announced in *Boston Shipping* (*supra*, pp. 37-38). It found it unnecessary to consider two of the four criteria—whether the agreement was the product of good faith, arms-length bargaining, and whether there was a conspiracy between PMA and ILWU—because it concluded that the agreement ran afoul of the two other criteria (A.P. 59a, 69a).

Shipping Act. *Federal Maritime Commission* v. *Svenska Amerika Linien, supra.* A conference rule in that case prohibited travel agents authorized to book passage for member lines from selling tickets for any nonmember line's steamers. This exclusion of nonmember lines from access to travel agents was closely analogous to denial of access of PMA nonmembers to the joint work force in the present case. The Court in *Svenska* noted that the rule "seriously interferes with the purpose of the antitrust laws," particularly the prohibitions on group boycotts, and upheld the Commission's finding that the rule violated Section 15.

[32] Nonmembers of PMA have indicated their willingness to continue to pay PMA for the fringe benefits their employees receive through the PMA-ILWU fringe benefit programs (App. 188).

The Commission ruled (a) that since the "primary purpose of the Revised Agreement is to bring nonmembers into the PMA 'camp,' " its effect upon the hours or working conditions of ILWU employees of PMA members is "incidental" to that "main purpose"; the subject of the agreement, therefore, "is not a mandatory subject of bargaining" (A.P. 62a); and (b) that since "the Agreement is specifically designed to compel nonmember entities to join PMA under threat of exclusion from the ILWU work force * * * it clearly imposes terms and conditions upon persons outside the bargaining unit" (A.P. 62a-63a). We now show that the record supports both of these conclusions. As the Commission pointed out (A.P. 58a, 62a), they are alternative grounds for considering the withholding of a labor exemption.

(a) The Commission stated that although an agreement deals with wages, hours, or working conditions, it does not relate to a mandatory subject of bargaining if it is not "directed to the labor relations of the contracting employer vis-a-vis his own employees" (A.P. 61a-62a). In defining "mandatory subject of bargaining" under the National Labor Relations Act, this Court stated in *Allied Chemical & Alkali Workers of America, Local Union 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178, that the concept

> includes only issues that settle an aspect of the relationship between the employer and employees. See, *e.g.*, *NLRB* v. *Borg-Warner Corp.*, 356 U.S. 342 (1958). Although normally matters involving individuals outside the employment relation-

> ship do not fall within that category, they are not wholly excluded.

Although this definition differs somewhat from the Commission's test whether the agreement is "directed to the labor relations of the contracting employer, vis-a-vis his own employees," in the present case the distinction is immaterial. Here the Revised Agreement was designed to eliminate the competitive advantages that PMA believed nonmembers of PMA had; any effect it had upon "settl[ing] an aspect of the relationship" between PMA members and their employees was minimal.

The Commission determined that "the primary purpose of the Revised Agreement is to bring nonmembers into the PMA 'camp'" (A.P. 62a). PMA admitted that it sought the Revised Agreement because of the "obvious competitive disadvantages" to PMA members when nonmember employers operated during strikes and the competitive advantage nonmembers had because of the ability to have a regular work force and to secure workers during periods of labor shortage (App. 90, 95-98, 102). PMA also considered the ability of nonmembers to "pick and choose fringe benefits on a piecemeal basis" to be "a competitive disadvantage" and an administrative burden for PMA (App. 102; see also App. 89-90). The Revised Agreement (App. 290-293) was drafted to eliminate these disadvantages[33] and place the PMA members

[33] Paragraph 3 requires nonmembers to observe the same work stoppage policies as members. Paragraph 5 restricts nonmember employment of regular employees to the same basis permitted members of PMA. Under paragraphs 7, 8, and 9, nonmembers must subscribe to all the same fringe benefit programs and other services accepted by members.

Paragraph 6, which the Commission found to impose work rules agreed to by PMA and ILWU on nonmembers, was subsequently rendered ineffectual by affirmance of the National Labor Relations Board decision in *International Longshoremen's and Warehousemen's Union* (*California Cartage Co.*), 208 NLRB 994, enforced without opinion *sub nom. International Longshoremen's and Warehousemen's Union* v. *National Labor Relations Board*, 515 F. 2d 1017 (C.A.D.C.), and *Pacific Maritime Association* v. *National Labor Relations Board*, 515 F. 2d 1018 (C.A.D.C.). That provision, however, was not considered decisive of the status of the agreement under Section 15 by either the Commission or court of appeals.

and nonmembers on more equal footing (App. 89-91, 95-103). The Commission properly concluded that the Revised Agreement did not relate to a mandatory subject of bargaining.

(b) Paragraph 2 of the Revised Agreement requires a nonmember's separate contract with ILWU insofar as it governs the selection of men for the work force, to conform with the Revised Agreement and the master collective bargaining contract (A.P. 65a). As the Commission found, this requirement effectively imposes on entities that are not members of the collective bargaining unit (PMA) various terms and conditions of the Revised Agreement, such as compliance with PMA labor policies during a work stoppage (A.P. 65a). Once a nonmember signs the Revised Agreement, it is indefinitely bound by the agreement unless both PMA and the ILWU release it (A.P. 65a-66a).

The practical effect of a nonmember's refusal to sign the Revised Agreement is to exclude the non-

member from the joint work force; as the Commission found, this effect virtually ensures that nonmembers will sign the agreement (A.P. 62a, 69a-71a). The ports cannot secure the skilled longshoremen they need, particularly heavy equipment operators, from outside the joint work force (A.P. 71a, n. 18; App. 186).[34] Furthermore, even for nonskilled workers the ports have used only the joint ILWU-PMA hiring hall, and have no source of such workers outside those halls (App. 220).

The Commission found that even if the ports could obtain qualified non-ILWU workers, ILWU members employed by PMA stevedoring companies to load and unload cargo would refuse to work the cargo in the ports, and that ILWU undoubtedly would establish picket lines at the entrances to all the ports' terminals. These actions would effectively stop the movement of cargo to or from the terminals by other workers who are members of the ILWU or other unions (A.P. 70a-71a; see also App. 60).

Thus, the Revised Agreement not only attempts to impose conditions upon persons outside the bargain-

[34] ILWU presumably would oppose any attempts by the ports to train their own skilled workers as a separate ILWU registered work force. ILWU historically has insisted on controlling the size of the regular work force and dividing work opportunities equally among regular workers. During World War II, it opposed the establishment of a branch hiring hall in San Francisco for a work force larger than that in the entire northwest. *Waterfront Employers Association*, 26 War Lab. Rep. 514, 520, 543-544.

ing unit, but is virtually certain to succeed in doing so.[35]

As the Commission stated (A.P. 66a), the Revised Agreement " 'bear[s] a striking resemblance' to that found unlawful * * * in *United Mine Workers* v. *Pennington*." In *Pennington* the Court held that the antitrust labor exemption would not cover an agreement between a union and large coal-operators "to impose the agreed-upon wage and royalty scales upon the smaller, nonunion operators, regardless of their abil-

[35] Although PMA generally will admit anyone to membership, becoming a member would not be a workable alternative for nonmembers to signing the Revised Agreement. As a member, the port would also have to forego the advantages of a separate labor contract that it now enjoys. In addition, substantial unrebutted evidence shows that PMA is overwhelmingly controlled by carriers, whose interests potentially conflict with those of the ports (App. 52, 64-65) and who might find it economically advantageous to divert cargo to other ports. There have been a number of recent Commission cases involving diversion of cargo from smaller and less accessible ports by carriers utilizing containerization. See *Delaware River Port Authority* v. *Federal Maritime Commission*, 536 F. 2d 391 (C.A. D.C.); *Intermodal Service to Portland, Oregon*, 17 FMC 106; *Pacific Coast European Conference*, 14 FMC 266; *Sea-Land Services, Inc.* v. *South Atlantic & Caribbean Line, Inc.*, 9 FMC 338.

If the ports contracted the work on their docks to PMA stevedores instead of signing the Revised Agreement, they would surrender significant control over the quality of services provided by their ports and the charges at their facilities (see A.P. 71a; App. 59). They might be placing control with persons with adverse interests. As the Commission noted, stevedoring companies could divert cargo from one port to another where they are able to operate more efficiently (App. 52; A.P. 71a) by simply granting different rates for each area (A.P. 71a).

ity to pay and regardless of whether or not the union represented the employees of these companies, all for the purpose of eliminating them from the industry, limiting production and pre-empting the market for the large, unionized operators" (381 U.S. at 664). The Court rejected the union's claim that "since such an agreement concerned wage standards, it is exempt from the antitrust laws" (*ibid.*), ruling that "the policy of the antitrust laws is clearly set against employer-union agreements seeking to prescribe labor standards outside the bargaining unit" (*id.* at 668).

The Commission here pointed out (A.P. 67a-68a, footnote omitted): "Instead of a system of computing wages, which because of difference in methods of production would be more costly to one set of employers than another [as in *Pennington*], the PMA and ILWU here have devised a scheme whereby the elimination of all local agreements between nonmembers and the ILWU would result in higher costs to one set of employers (the nonmembers) than to another (PMA members); particularly, since the differences in methods of operation and locality are ignored." As in *Pennington*, the Revised Agreement here involves an agreement between an association of employers and a union designed to control labor standards and conditions of third persons, namely, nonmembers of the association.

The Revised Agreement is similar to the agreement in *Pennington* in another respect: the union here has "surrender[ed] its freedom to act in its own interest *vis-à-vis* other employers" (381 U.S. at 667). The

ILWU cannot bargain on behalf of its joint work force members who work for nonmembers of PMA, to secure terms or conditions of employment for those employees that are more favorable to the nonmember employers than those of PMA members.

In sum, the record supports the Commission's conclusion (A.P. 70a-71a) that while the Revised Agreement will have "little if any effect on the collective bargaining process," it has "a potentially severe and adverse effect upon competition." In these circumstances, the Commission properly denied the Revised Agreement a labor act exemption and properly undertook "consideration of its approvability under the standards" of the Shipping Act (A.P. 70a).

3. The court of appeals, viewing the ports' argument as a claim "that they are being forced against their wills into a multi-employer unit [namely, PMA]," concluded that this was an issue "within the realm of National Labor Relations Board expertise" and not cognizable under the Shipping Act (A.P. 37a). The court stated that "the NLRB has more experience in interpreting contested bargaining terms than the FMC" (*ibid.*). It further stated (*id.* at 37a-38a) that since "identical claims" to those before the Commission are pending in antitrust cases (see note 15, *supra*, p. 12), the antitrust courts "are the proper forums for resolution of the issue."

a. In considering the Revised Agreement under Section 15 of the Shipping Act, the Commission would not be required to determine any question relating to the appropriate bargaining unit. The National Labor

Relations Board determined the appropriate unit for the west coast shipping industry many years ago (see *supra*, pp. 5-6) and only the Board can reexamine or change that determination.[36] In deciding the issues under the Shipping Act, the Commission accepts, as it must, the bargaining units the Board has designated.

The fact that there may be questions under the National Labor Relations Act regarding some provisions of the Revised Agreement does not mean that the agreement has a labor exemption and is thus beyond the Commission's scrutiny. As Mr. Justice Harlan stated in his concurring opinion in *Volkswagenwerk, supra* (390 U.S. at 286), there is "no warrant for assuming, in advance, that a maritime agreement must always fall neatly into either the Labor Board or Maritime Commission domain; a single contract might well raise issues of concern to both." Cf. *Meat Cutters* v. *Jewel Tea*, 381 U.S. 676, 684-688; *Connell Construction Co., Inc.* v. *Plumbers & Steamfitters Local Union No. 100, supra*, 421 U.S. at 626.

This Court similarly has recognized that cases involving the interface between union activities and

[36] A multi-employer bargaining unit, such as PMA, cannot be enlarged without the consent of all parties, including any additional employers to be made part of the unit. *Western States Regional Council No. 3, Woodworkers* v. *National Labor Relations Board*, 398 F. 2d 770, 773 (C.A. D.C.); *Komatz Construction, Inc.* v. *National Labor Relations Board*, 458 F. 2d 317, 321 (C.A. 8); *Douds* v. *International Longshoremen's Association*, 241 F. 2d 278, 281-283 (C.A. 2).

motor carrier regulation may raise related but separate labor and regulatory issues respectively cognizable by the National Labor Relations Board and the Interstate Commerce Commission. *Local 1976, United Brotherhood of Carpenters* v. *National Labor Relations Board*, 357 U.S. 93, 109-111; *Burlington Truck Lines* v. *United States*, 371 U.S. 156. In *Burlington* the Court described its *Local 1976* decision as "conclud[ing] that although 'common factors may emerge in the adjudication of these questions' under the two Acts by the two different agencies, nevertheless independent consideration and resolution were possible, the National Labor Relations Board directing itself to consideration of whether the employees violated their duties under § 8(b) and the Interstate Commerce Commission directing its attention to whether the carrier 'may have failed in his obligations under the Interstate Commerce Act' " (371 U.S. at 173).

The fact that the National Labor Relations Board has greater experience than the Commission "in interpreting contested bargaining terms" (A.P. 37a) is beside the point. The determination whether the Revised Agreement has a labor exemption turns primarily upon the comparative impact on Shipping Act and labor interests of subjecting the agreement to Commission scrutiny. That inquiry, requiring as it does a balancing of those interests, is a matter calling for the expertise of the Commission.

b. The court of appeals' theory that the pendency of the antitrust cases raising the same issues as those presented to the Commission under the Shipping Act

ousts the latter agency of authority to consider those issues reverses the normal rule governing the relationship between the antitrust court and the agency. The usual practice is for the court preliminarily to defer to the expert agency, not for the latter to abdicate its role to the courts. Cf. *Far East Conference* v. *United States*, 342 U.S. 570, 574-576. The court of appeals' ruling is particularly anomalous under the Shipping Act, since if the Commission approves the Revised Agreement under Section 15, the resulting antitrust exemption will end the antitrust cases. The proper "accommodati[on] [of] the complementary roles of courts and administrative agencies in the enforcement of law" (*Far East Conference*, *supra*, 342 U.S. at 575) requires that the Commission proceedings have precedence over, and not be subordinate to, the pending antitrust cases.

In conclusion, we reiterate that the Commission has not decided anything with respect to the merits of the agreement under Section 15, but only has made the threshhold determination that the agreement must be filed with it. If the Court agrees with us that the Commission correctly held that that section covers the agreement, the agency will then decide whether the agreement is valid under that section and under Sections 16 and 17. The Commission may approve the agreement under Section 15 if appropriate circumstances are shown, thereby giving it antitrust immunity; or the agency may disapprove it under any of those sections. Its final action is subject to review in the court of appeals.

The only issue before this Court now is whether the Commission is barred from even scrutinizing the agreement to determine whether it meets the substantive standards of Section 15. For the reasons set forth above, the Commission properly concluded that the agreement is not exempt from that section.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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